Kurban Ali Shah bin Syed Ahmad Ali Shah v Pacific & Orient Insurance Co Sdn Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO 12-37 OF 1997
PS GILL J
27 JULY 2001

Contract *— Guarantee — Demand for payment — Construction of letter of guarantee and indemnity — Whether demand notice was condition precedent to liability under guarantee — Whether filing of writ is sufficient demand obliging payment*

The issue in question was whether a demand notice was a condition precedent to a liability under a guarantee. It was agreed by the parties that any notice required to be served pursuant to the letter of guarantee and indemnity shall be in writing and sufficiently served on the parties by hand or by prepaid registered post at the respective addresses. The defendant contended that there was no evidence that a notice of demand was sent to the guarantor prior to the commencement of this action against the guarantor. The plaintiff admitted that there was no cogent evidence of service by posting of the notice of demand, but submitted that such a notice had in fact been sent.

Held, dismissing the appeal of the defendant/guarantor with costs:

(1) On perusing the letter of guarantee and indemnity, it was clear that the defendant/guarantor, in this instance, had agreed to be the principal debtor, and not just surety. There was not a hint or suggestion that the letter of guarantee and indemnity in this instance was an 'on demand' guarantee. The wording of the letter of guarantee and indemnity as a whole made it apparent that there were no words in any of the clauses in the guarantee that made a prior demand on the guarantors a condition precedent to liability. Therefore, the plaintiff by the terms of this letter of guarantee and indemnity was clearly entitled to look to the defendant as principal debtor for payment of the present debt, as opposed to a collateral debt, and without having to give the defendant a prior notice of demand in respect of any default having been made by the defendant (see p 549G–I).

(2) The letter of guarantee and indemnity was not a 'demand guarantee'. The plaintiff's inability to prove evidence of service of this notice of demand was of no consequence. The filing and service of the writ on the defendant in this instance constituted a sufficient demand obliging the defendant/guarantor to pay. The submission in this respect of the defence counsel should by sheer perforce failed, leaving the court with no alternative but to dismiss the appeal of the defendant/guarantor with costs (see p 550A–B).

[Bahasa Malaysia summary

Isu yang dipersoalkan adalah sama ada satu notis tuntutan adalah satu pra syarat kepada satu liabiliti di bawah satu gerenti. Adalah dipersetujui oleh pihak-pihak bahawa apa-apa notis yang dikehendaki untuk disampaikan menurut surat gerenti dan indemniti hendaklah secara bertulis dan memadai disampaikan ke atas pihak-pihak dengan tangan atau melalui pos berdaftar pra bayar di alamat masing-masing. Defendan telah menegaskan bahawa tiada keterangan bahawa satu notis tuntutan telah dihantar kepada penggerenti sebelum bermulanya tindakan ini terhadap penggerenti. Plaintif mengaku bahawa tiada keterangan yang meyakinkan tentang penyampaian notis tersebut dengan memposkan notis tuntutan tersebut, tetapi menghujahkan bahawa notis sedemikian memang telah dihantar.

Diputuskan, menolak rayuan defendan/penggerenti tersebut dengan kos:

(1) Setelah meneliti surat gerenti dan indemniti tersebut, adalah jelas bahawa defendan/penggerenti, dalam kes ini, telah bersetuju untuk menjadi penghutang utama, dan bukan sahaja sebagai penggerenti. Tiada tanda atau cadangan bahawa surat gerenti dan indemniti di sini merupakan satu gerenti 'melalui tuntutan' (on demand guarantee). Perkataan-perkataan dalam surat gerenti dan indemniti secara keseluruhannya menunjukkan dengan jelas bahawa tiada perkataan dalam mana-mana klausa dalam gerenti tersebut yang membuat satu tuntutan terdahulu ke atas penggerenti-penggerenti satu pra syarat terhadap liabiliti. Oleh itu, plaintif melalui terma-terma surat gerenti dan indemniti tersebut dengan jelas berhak untuk menganggap defendan sebagai penghutang utama bagi pembayaran hutang tersebut, dan bukan satu hutang kolateral, dan tanpa memberikan kepada defendan terlebih dahulu satu notis tuntutan berhubung apa-apa kegagalan yang telah dibuat oleh defendan (lihat ms 549G–I).

(2) Surat gerenti dan indemniti tersebut bukan satu 'gerenti melalui tuntutan'. Kegagalan plaintif untuk membuktikan keterangan penyampaian notis tuntutan tersebut tidak mempunyai apa-apa kesan. Pemfailan dan penyampaian writ ke atas defendan di sini membentuk satu tuntutan yang mencukupi yang mengobligasikan defendan/penggerenti untuk membayar. Penghujahan peguam pembelaan berhubung ini hendaklah gagal, meninggalkan mahkamah tanpa apa-apa pilihan tetapi untuk menolak rayuan defendan/penggerenti dengan kos (lihat ms 550A–B).]

Notes

For cases on demand for payment, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2922–2934.

Cases referred to

Kwong Yik Bank Bhd v Transbuilder Sdn Bhd & Ors [1989] 12 MLJ 301 (refd)
Mok Hin Wah & Ors v UMBC [1987] 2 MLJ 610 (refd)
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd [1989] 3 MLJ 155 (refd)
Public Bank Bhd v Chan Siok Lie & Ors [1989] 2 MLJ 305 (refd)

Nasha (*RJ Esa & Co*) for the appellant.
Mary Lim (*Selvam Nanda & Partners*) for the respondent.

PS Gill J. : The issue to be determined in the present appeal is whether a demand notice is a condition precedent to a liability under a guarantee. The principal argument of the defence counsel on appeal was that there was no evidence that a notice of demand was sent to the guarantor prior to the commencement of this action against the guarantor. The defence counsel relied on cl (f) of the letter of guarantee and indemnity, wherein it is held that any notice required to be served pursuant to this guarantee and indemnity shall be in writing, and shall be sufficiently served on the parties hereto by hand, or prepaid registered post, at the respective addresses.

The defence counsel went on to submit that there was no evidence of such posting of the requisite notice of demand pursuant to cl (f) of the letter of guarantee and indemnity. Counsel argued that since no prior demand has been made on the defence under the guarantee and indemnity agreement, there was no obligation to pay.

The plaintiff's counsel admitted there was no cogent evidence of service by posting of the said notice of demand, but submitted that such a notice of demand was in fact sent to the defendant.

The defence counsel would be correct in her assertion on the need that a demand is a condition precedent to liability under a guarantee, if by the terms of the letter of guarantee and indemnity the parties have made it a condition that before an obligation to pay under the guarantee can arise, there should first be a demand for payment made on the guarantee. The defence no doubt relies on the authorities of *Mok Hin Wah & Ors v UMBC* [1987] 2 MLJ 610 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155, which are to the effect that if by the terms of a guarantee, a demand on a guarantor is a requirement, a proper demand must be made on a guarantor and such a demand is a sine qua non to establishing a claim against a guarantor. The critical issue here is whether the terms of the present guarantee and indemnity impose on the plaintiff such a requirement.

Learned counsel for the defendant had drawn my attention to cl (f) of the letter of guarantee and indemnity, which she contends makes a demand a condition precedent. Clause (f) of the said letter of guarantee and indemnity states:

> (f) agree that any notice required to be served pursuant to this guarantee and indemnity shall be in writing and shall be sufficiently served on the parties

> hereto by hand or prepaid registered post at the respective addresses as stated herein or the last known address of the addressee and any notice served by registered post shall be deemed to have been received by the addressee when it ought in the ordinary course of post to be delivered to the address to which it was sent.

Miss Mary Lim, counsel for the plaintiff, in her rebuttal submission maintained that there was scarcely anything to suggest in cl (f) that a demand is a prerequisite to the liability of the defence. She also went on to submit that the demand this court is concerned with in this appeal is not what can be referred to as a 'demand guarantee', and this becomes patently clear when the other clauses of the said letter of guarantee and indemnity are read.

In the course of my deliberations, I came upon two authorities, namely *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 and *Kwong Yik Bank Bhd v Transbuilder Sdn Bhd & Ors* [1989] 2 MLJ 301. In the case of *Public Bank Bhd v Chan Siok Lie & Ors*, Shankar J (as he then was) cautioned that the case of *Mok Hin Wah & Ors v UMBC* [1987] 2 MLJ 610 should be applied with care as *Mok Hin Wah*'s case will only apply if the words of the guarantee specially make a prior demand a condition precedent to suing the guarantor. Shankar J then went on to say at pp 308–309:

> …There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a sine qua non to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases. The writ itself is a notice: See *Malayan Banking Bhd v Lim Ghee Leng* [1985] 1 MLJ 214 …
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> A far clearer exposition of the law on the point is given in *O' Donovon's Modern Law of Guarantee* at pp 379–382 … . At p 380 of the text it says that even though the amounts under the guarantee are expressed to be payable 'on demand', the inclusion of a 'principal debtor' clause in the body of a guarantee may obviate the necessity for the creditor to make a demand… Thus I hold, that where the effect of a guarantee agreement is to make the guarantors principal debtors, the necessity for a demand could be obviated because the character of the agreement under which payment is sought is no longer strictly collateral.

Bearing in mind the aforesaid authority and on perusing the said letter of guarantee and indemnity, it is 'plain as pikestaff' that the defendant/guarantor, in this instance, had agreed to be the principal debtor, and not just surety (please refer to cl (a)). There was not a hint or suggestion that the letter of guarantee and indemnity in this instance, is an 'on demand' guarantee. The wording of the letter of guarantee and indemnity as a whole, in my view, makes it apparent that there are no words in any of the clauses in this guarantee that makes a prior demand on the guarantors a condition precedent to liability. Thus said, the plaintiff by the terms of this letter of guarantee and indemnity is clearly entitled to look to the defendant as principal debtor for payment of the present debt, as opposed to a collateral debt, and without having to give the defendant a prior notice of demand in respect of any default having been made by the defendant.

In the above circumstances, it is my considered view that this letter of guarantee and indemnity is not a 'demand guarantee' and I find that the plaintiff's inability to prove evidence of service of this said notice of demand is of no consequence. The filing and service of the writ on the defendant in this instance constituted a sufficient demand obliging the defendant/guarantor to pay. The submission in this respect of the defence counsel should by sheer perforce fail, leaving me with no alternative but to dismiss the appeal of the defendant/guarantor with costs.

Appeal dismissed with costs.

Reported by Wong Ee Lynn